

OGC 79-00197

8 January 1979

*OLC 79-0027/1
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MEMORANDUM FOR: Chairman, DCI Security Committee
Chief, Policy and Coordination Staff/DDO
Special Assistant/DDS&T

FROM:

[REDACTED]
Assistant General Counsel

SUBJECT: HPSCI Hearings on the Protection and Use
of National Security Information in
Criminal and Civil Litigation

1. Chairman Boland's letter to the DCI advising of the subject hearings is at Tab A and includes a hearing schedule and tentative witness list and "prospectus" which outlines the Committee's objectives. The General Counsel has been designated to appear on the DCI's behalf with the understanding that he can call upon other components and individuals for assistance as needed (Tab B).

2. At present, it appears that your assistance may be needed in connection with the session scheduled for 1 February 1979 (see tentative schedule and prospectus). At the morning session that day, the Committee intends to examine cases of intelligence disclosures that were not investigated or prosecuted. We may be called upon to explain why the disclosures were damaging and any factors which weighed against investigative or prosecutive action. In the afternoon session we will be asked to suggest categories of secrets the disclosure of which might warrant treatment as separate criminal offenses without regard to existing law. We should have further guidance after we discuss the hearings with members of the HPSCI Staff on 11 January.

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Attachments

cc: [REDACTED] OLC
Special
Security Center

MORI/CDF Pages 1-18

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U.S. HOUSE OF REPRESENTATIVES

PERMANENT SELECT COMMITTEE
ON INTELLIGENCE

WASHINGTON, D.C. 20515

December 22, 1978

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Honorable Stansfield Turner
Director of Central Intelligence
Washington, D. C. 20505

Dear Admiral Turner:

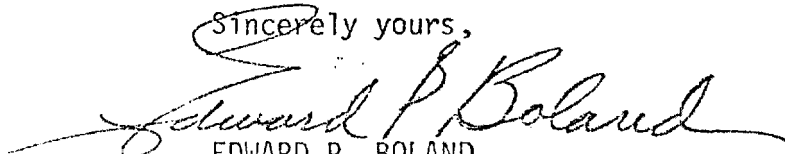
The Permanent Select Committee on Intelligence intends to hold a series of hearings beginning in late January 1979 concerned with the protection and use of national security information in the context of both criminal and civil litigation. The hearings, which will consist of seven sessions spanning four days, will concentrate on the problems inherent in trying cases involving espionage, leaks of classified material, and the phenomenon called "graymail" as well as the use of pre-publication review and other civil proceedings to preclude the publication of classified material. The hearings will be conducted by the Subcommittee on Legislation, chaired by Congressman Morgan F. Murphy.

Because of your great interest in this subject, both as the Director of Central Intelligence and head of the Central Intelligence Agency, I am proposing that you designate witnesses to appear on your behalf to discuss various problems that the intelligence community has encountered in the areas within the scope of the Committee's inquiry. I believe, on the basis of previous appearances before this Committee, that your General Counsel, Anthony Lapham, has an excellent grasp on the issues that will arise in the context of the Committee's hearings and would be a fine lead-off witness.

As an aid to preparation for participation in the hearings, I enclose a prospectus for each session, materials which embody some suggested remedies to the problems of litigation involving national security information and a tentative witness list. To assist the Committee staff in preparing for the hearings, it would be appreciated that any written statement be submitted at least 72 hours in advance. Additional information concerning the hearings may be obtained from Mr. Michael O'Neil, Chief Counsel of the Committee, at 225-4121.

With every good wish, I am

Sincerely yours,


EDWARD P. BOLAND
Chairman

Enclosures

HEARING SCHEDULE
WITH TENTATIVE WITNESS LIST

All Hearings will be held in Room H-405 in the Capitol Building.

January 24

Morning Session: 9:00 a.m.-12:00 noon (open)

Topic: The Problem

Witnesses: Robert Keuch, Deputy Assistant Attorney General
for Criminal Division

Anthony Lapham, General Counsel, CIA

General Counsel, CIA

Afternoon Session: 1:00-4:00 p.m. (open)

Topic: Pre-Publication Review

Witnesses: Anthony Lapham, General Counsel, CIA

Representative from Department of Justice,
Civil Division - *Tom Martin*

Mark Lynch, ACLU Attorney

January 25

Morning Session 9:00 a.m.-12:00 noon (open)

Topic: Proposals

Witnesses: Senator Joseph Biden, Chairman, Subcommittee
on Secrecy and Disclosure, Senate Select
Committee on Intelligence

Philip Lacovara, Esq., Hughes, Hubbard and Reed

Professors Harold Edgar and Benno C. Schmidt, Jr.,
Columbia University Law School

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January 31

Morning Session: 9:00 a.m.-12:00 noon (open)

Topic: Comment on Legislative Proposals by Distinguished Legal Scholars

Witnesses: William Colby, Colby, Miller and Hanes
Edward Levi, University of Chicago Law School
Antonin Scalia, University of Chicago Law School

Afternoon Session: 1:00-4:00 p.m. (open)

Topic: Comment on Legislative Proposals by Distinguished Civilian Trial Lawyers

Witnesses: Mitchell Rogovin, Rogovin, Stern and Huge
William ^NHudley, Attorney at Law
Michael Tigar, Tigar and Baffome

February 1

Morning Session: 9:00 a.m.-12:00 noon (closed)

Topic: Case Histories of Intelligence Disclosures Which Were Not Investigated or Prosecuted

Witnesses: Representatives of CIA, NSA, DoD and DoJ

Afternoon Session: 1:00-4:00 p.m. (closed)

Topic: Genuine National Security Secrets

Witnesses: Representatives of CIA, NSA, DoD and DoJ

Bibliographic Note

During the course of the hearings, attention will be given to certain proposals advanced by experienced commentators on how to resolve perceived problems in the use and protection of national security information through both civil and criminal litigation. For purposes of reference the conclusions of Professors Schmidt and Edgar may be found in the enclosed portion of their landmark review of the espionage statutes. The complete work, entitled "The Espionage Statutes and Publication of Defense Information" may be found at 73 Columbia Law Review 929 (May 1973). It is strongly recommended as the most authoritative work of its kind.

Also included in the materials under this cover are the 1978 report and hearings of the Senate Select Committee on Intelligence's Subcommittee on Secrecy and Disclosure. The Subcommittee, chaired by Senator Joseph R. Biden, explored the same subjects which this Committee hopes to consider. Among the witnesses to appear before the Subcommittee were Mr. Phillip Lacovara, former Deputy Solicitor General and counsel to the Watergate Special Prosecutor and Mr. William Colby, former Director of Central Intelligence. Both gentlemen advanced suggestions in the course of their testimony (Beginning respectively on pages 59 and 89 of the hearings) which the hearings will address directly.

Finally, the hearings will solicit understanding of, and comment on, the recommendations contained in the Subcommittee's report (beginning on page 30 of the report).

Examination of all these materials should aid witnesses in focusing on current thinking about the espionage statutes and related issues. The Committee wishes to solicit comment on these proposals and any others which witnesses may wish to make - as well as references to other materials of which the Committee is unaware.

PROSPECTUS

On January 24, 1979, the Legislative Subcommittee of the House Permanent Select Committee on Intelligence will begin four days of hearings devoted to the constitutional, legal, and intelligence problems involved in utilizing civil litigation or the criminal justice system to protect classified information against unauthorized disclosure.

Such disclosures may be effected in a variety of ways -- clandestine transmittal to a foreign government by an espionage agent, leaks to the press by a former government employee, or testimony during trial by a criminal defendant or a witness on his behalf -- all of which may equally threaten the national security. However, the government's response to such disclosures has varied from forceful prosecution to active disregard. To the extent that such disparate treatment and any detrimental result are caused by attention to constitutional principles there may be no solution to the core problem. However, to the extent that a failure to adequately prevent or respond to disclosures of classified information is caused by poorly drafted legislation, a lack of legislation, restrictive or conflicting judicial procedures, intra-executive branch squabbling, institutional myopia, or the abuse of prosecutorial discretion, a solution may be reachable and necessary.

Some suggest that the root of the problem lies with the existing espionage laws, which are not tied to the classification system and which, because they require proof of intent to harm the United States or advantage a foreign nation and of the relation of the information or document to the national defense, necessitate making public the very information, the transfer or disclosure of which is the reason for the prosecution. In addition, considerable doubt has been expressed as to whether the scope of the espionage laws was ever intended to extend beyond real espionage to the common "leak"-- especially when the leak is published in book form. Finally, while 18 U.S.C. 798 purports to make the unauthorized disclosure of classified cryptologic and communications security information a per se offense, there is a legitimate question whether the judge or the jury, or both, have the duty to look behind the classification to determine if the information disclosed was properly classified.

In addition to the problems inherent in the espionage statutes, the Federal Rules of Criminal Procedure and related concepts require the disclosure of a great amount of information during the normal course of a criminal trial. Any effort to restrict the defense's access to relevant information threatens to make the judge a trier of fact,

while the conduct of portions of a criminal trial behind closed doors may endanger cherished constitutional principles. In the same manner, proposals to make the unauthorized disclosure and/or retention of classified information a criminal offense have substantial first amendment implications -- which are compounded by the abuse and misuse to which the existing classification system is subject.

The above are some of the factors that appear to the Committee to complicate consideration of the protection and use of national security information through litigation. The hearings will concentrate on these and related issues. They will attempt to determine if problems really exist and, if so, what can or should be done about them. To the extent possible, the discussion of the issues will be channeled into four separate areas: espionage, leaks, pre-publication review, and "graymail". To that end, the following synopses of the seven sessions of the hearings are intended to focus on what, at the outset, the Committee hopes to explore at each session.

First Session

January 24, 1979 - Morning

This session will be devoted to an explication of the problem as perceived by the Department of Justice, the CIA, and the NSA. Lawyers from these agencies will be asked to summarize their view of the content and scope of the espionage laws and the extent to which these laws aid or hinder the prosecution of espionage and leak cases, and, as a result, either aid or hinder the protection of classified information.

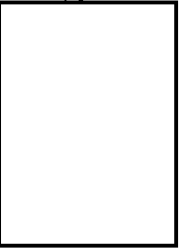
Drawing on their practical experience, the witnesses will be asked to describe those elements of constitutional law or criminal procedure which, in their view, require or allow the disclosure of classified information during a prosecution, depending on whether the disclosure is made by the government or the defendant, and whether the defendant is a spy, a leaker, a government employee accused of other wrongdoing, or a nongovernment employee charged with crimes unrelated to espionage or leaks.

Testimony will also be elicited as to the manner in which intelligence agencies and the Department of Justice determine whether an espionage or leak case is to be investigated and prosecuted, and as to the existence of any institutional conflicts which hinder this determination.

Apparently, many such cases have gone uninvestigated and/or unprosecuted because the intelligence agencies hesitate to disclose the classified information necessary for trial, while the Justice Department refuses to even begin an investigation until the intelligence agencies agree to such a declassification.

The witnesses also will be asked to comment on whether even a strong anti-leak law would lead to prosecution of the high government officials who some perceive to be the source of most important leaks, or whether such a law would be otherwise utilized in light of the oft-stated concern that to prosecute - or even investigate - a leak would only further publicize or confirm the accuracy of its content.

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In summary, the first session should explicate any existing problems, attempt to determine to what degree they are caused by a lack of effective criminal statutes or the strictures of the criminal trial process, institutional prejudices and/or conflicts, or a lack of prosecutorial initiative, so as to aid the Committee in assessing recommendations on corrective legislation or administrative action.

Second Session

January 24, 1979 - Afternoon

The second session will concentrate on the leak/espionage problem as it relates to disclosure of classified information by way of publication in print, and the attendant and difficult issues of pre-publication review and/or restraint and post-publication remedies.

Department of Justice and CIA witnesses will be asked to describe the Government's legal response (or lack thereof) to such cases in the past (Marchetti/Marks, Agee, Snepp, Stockwell), with some detail expected as to the legal theories involved, judicial rulings thereon, and the various alternative actions that many have been discussed but not taken. Recommendations as to remedies will be sought and comments solicited on existing proposals to criminalize the publication of names of intelligence agents. OPEN?

Other witnesses presenting the viewpoint of previous defendants in pre-publication suits will be asked to respond to the preceeding testimony and comment on legislative proposals.

It is expected that all witnesses will discuss such topics as secrecy oaths and agreements, injunctive relief (whether or not based on contract theories), criminal and civil penalties, and pre-publication review by intelligence agencies. Particular attention should be paid to the judicial theories propounded in the New York Times, Marchetti, and Snepp cases.

Third Session

January 25, 1979 - Morning

This session will hear from Professors Schmidt and Edgar, Senator Biden, and former Assistant Special Prosecutor Lacovara -- all of whom have previously studied and/or testified on subjects relating to espionage laws and leaks. (Former Director of Central Intelligence Colby has also advanced a proposal in this context, but will be unable to appear until the January 31 morning session.) They will be asked to state any problems they perceive in the espionage/leak area, comment on suggested remedies, and offer their solutions -- all in the context of their particular area of expertise.

The attached report of the Subcommittee on Secrecy and Disclosure of the Senate Select Committee on Intelligence contains Senator Biden's recommendations. The accompanying hearings contain the views of William Colby and Phillip Lacovara. Also attached are the recommendations with which Professors Schmidt and Edgar concluded their seminal 1973 Columbia Law Review article on the espionage laws. Some of the suggestions of these and other students of the issue include:

- * Prospectively defining a list of super secrets (which may or may not include sources and methods) separate

from the existing classification system, the unauthorized disclosure of which would be a per se criminal offense;

- * Rewriting the espionage laws so as to make the unauthorized disclosure of classified information to a foreign government or agent a per se criminal offense;

- * Defining an evidentiary state secrets privilege available to the government when the defense seeks access to classified information, with the determination as to its proper invocation and applicability to be made by the judge in camera, coupled with a sliding scale of remedies for non-disclosure available to the defense at the judge's discretion.

- * Make the unauthorized disclosure of any classified information a criminal offense, but exempt the recipient of the information from liability, require that a government agency be established to hear classification appeals before a prosecution could be initiated, and make it an affirmative defense, to be decided by the judge in camera, that the information was not properly classified.

- * Establishing special pre-trial procedures for cases where national security secrets are likely to arise in the course of a prosecution which would require the defendant to put the government on notice of all motions, defenses, or arguments he intended to make which would require the discovery or disclosure of classified information or the use of intelligence community witnesses. The court would

then be required to rule in advance on the admissability and relevance of the information and on the scope of witnesses' testimony.

* Make it a criminal offense for a government employee or former employee to disclose classified information without first giving notice to the relevant agency and waiting a specified period of time; during the waiting period the government would be required to review the classification and, if it were determined that the classification was proper, could seek an injunction under the Pentagon Papers standard; absent an injunction, no criminal penalty would attach to disclosure at the end of the waiting period - even if the information had been determined to be properly classified; per se criminality would attach, however, to any government employee and former employee who discloses classified information without going through this process.

Fourth and Fifth Sessions

January 31, 1979 - Morning - Afternoon

These sessions will hear from distinguished legal scholars and practitioners with expertise in criminal law and procedure and the constitutional and legal issues related thereto.

These witnesses will be asked to comment on the practicality, propriety, and constitutionality of the various proposals mentioned hereinabove, to detail some of the problems involved in defending a criminal case, and delineate the manner in which some of the proposals might impinge on a defendant's rights. Specific attention should be directed to:

(1) the content of the sixth amendment's guarantee of a public trial;

(2) the sixth amendment implications of the application of a protective order to the defendant and his counsel;

(3) the criteria for distinguishing between an issue of fact to be decided by the jury and an issue of law to be decided by the judge;

(4) the due process/fair trial implications of a state security privilege and a requirement that the defense give pre-trial notice of its arguments, motions, and defenses;

(5) the due process/fair trial implications of a statute which would make disclosure of intelligence sources and methods

a per se offense, and allow the judge to determine in camera whether the disclosed information dealt with sources and methods.

The views of the witnesses will also be sought on the first amendment issues involved in:

(1) pre-publication review/post-publication penalties proposals, and

(2) criminal penalties for disclosure or reception of any classified information.

Sixth and Seventh Sessions

February 1, 1979 - Morning and Afternoon

The morning session will be closed to the public. Intelligence agency and Department of Justice officials will discuss actual cases of espionage or damaging leaks which were prosecuted and those which were not; define actual damage to the national security caused by the leaks; and explain why there was no investigation and/or prosecution in some cases. It is hoped that this session will serve to draw out examples of the actual workings of present practice, its drawbacks and how proposed changes would affect future cases.

The afternoon session will also be closed. Intelligence agency officials will be asked to define those secrets which should be placed in a special category separate from the existing classification system, the unauthorized disclosure of which would be serious enough to warrant designating disclosure of such as a per se criminal offense.

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